

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Copeland Channel 21, LLC)	CSR-8250-M
v.)	
Charter Communications, Inc.)	
)	
Request for Carriage)	

MEMORANDUM OPINION AND ORDER

Adopted: March 16, 2010

Released: March 18, 2010

By the Senior Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Copeland Channel 21, LLC, licensee of television broadcast station WHRE-DT, Virginia Beach, Virginia (“WHRE-DT”), filed the above-captioned complaint against Charter Communications, Inc. (“Charter”), for its failure to carry WHRE-DT on its cable systems serving communities located in Norfolk-Portsmouth-Newport News, Virginia designated market area (“DMA”).¹ An opposition to this petition was filed on behalf of Charter to which WHRE-DT replied. For the reasons discussed below, we grant WHRE-DT’s request.

II. DISCUSSION

2. Pursuant to Section 614 of the Communications Act and implementing rules adopted by the Commission in *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues (“Must Carry Order”)*, commercial television broadcast stations are entitled to assert mandatory carriage rights on cable systems located within the station’s market.² A station’s market for this purpose is its “designated market area,” or DMA, as defined by Nielsen Media Research.³

¹WHRE-TV’s petition does not specify any particular communities served by Charter, but the two must carry election letters appended to its petition refer to the communities of Chincoteague, Franklin, Suffolk, Tangier Island and Cape Charles, Virginia; and Gates, Waves, and Manteo, North Carolina. See Petition at Exhibit B.

²8 FCC Rcd 2965, 2976-2977 (1993).

³Section 614(h)(1)(C) of the Communications Act, as amended by the Telecommunications Act of 1996, provides that a station’s market shall be determined by the Commission by regulation or order using, where available, commercial publications which delineate television markets based on viewing patterns. See 47 U.S.C. § (continued....)

3. In support of its complaint, WHRE-DT states that it is a full-power television station licensed to Virginia Beach, Virginia, which is in the Norfolk-Portsmouth-Newport News, Virginia DMA.⁴ WHRE-DT notes that its programming is furnished by Trinity Broadcasting Network (“Trinity”) pursuant to a time brokerage agreement.⁵ WHRE-DT states that, by letter dated March 29, 2006, even before it went on-the-air, it requested carriage on Charter’s cable systems.⁶ On April 10, 2006, Charter responded, requesting that a representative of WHRE-DT contact Charter regarding signal quality testing.⁷ WHRE-DT maintains that the local manager for Trinity has been in contact with Charter many times subsequently and has been advised that WHRE-DT’s signal quality is excellent.⁸ By letter dated September 26, 2008, WHRE-DT states that it formally notified Charter that, as of the beginning of the January 1, 2009 carriage cycle, it was electing must carry status on Charter’s systems.⁹ WHRE-DT maintains that on September 29, 2009, Charter confirmed via telephone that WHRE-DT provided a “good quality signal.”¹⁰ Since that time, however, WHRE-DT maintains that Charter has yet to begin carriage of its signal. As a result, WHRE-DT states that it is filing this petition out of an abundance of caution to preserve its rights. WHRE-DT therefore requests that the Commission grant its request and require Charter to commence carriage of its signal.

4. In opposition, Charter argues that WHRE-DT’s complaint is premature and should be denied.¹¹ Charter points out that in establishing the must carry regulations, the Commission set forth a two-step notification process. Section 76.64(f)(1) and (2) of the Commission’s rules requires commercial television stations, such as WHRE-DT, to choose between retransmission consent and must carry status at specified election periods.¹² Section 76.61(a)(1) of the rules mandates that a television station that believes that a cable operator has failed to meet its carriage obligations shall notify the cable operator in writing of the alleged failure and identify its reason for believing the operator is obligated to carry the station’s signal.¹³ Charter notes further that, in the *Must Carry Order*, the Commission stated that it is “[t]his initial notification [that] will act as a condition precedent to a commercial or LPTV station filing a complaint with the Commission. . . .”¹⁴ Charter states that cable operators are required to respond to this Section 76.61(a)(1) notification within thirty days, pursuant to Section 76.61(a)(2) of the rules, and television stations that have been denied carriage may then file a must carry complaint with the

(...continued from previous page)

534(h)(1)(C). Section 76.55(e) of the Commission’s rules requires that a commercial broadcast television station’s market be defined by Nielsen Media Research’s DMAs. See 47 C.F.R. § 76.55(e).

⁴Petition at 1-2.

⁵*Id.* at 2.

⁶*Id.*

⁷*Id.* at Exhibit A.

⁸*Id.* at 2.

⁹*Id.* at Exhibit B.

¹⁰*Id.* at 2. WHRE-DT states that Charter’s engineer reported that WHRE-DT registered a signal strength of +7dBmV to +8dBmV at Charter’s headend.

¹¹Opposition at 1.

¹²*Id.* at 1-2, citing 47 C.F.R. § 76.64(f)(1) and (2).

¹³*Id.* at 2, citing 47 C.F.R. § 76.61(a)(1).

¹⁴*Id.* at 2, citing *Must Carry Order*, 8 FCC Rcd at 2994.

Commission within sixty days after denial, pursuant to Section 76.61(a)(3) and (5) of the rules.¹⁵ In this case, Charter argues, WHRE-DT has not formally requested carriage on Charter's cable systems, pursuant to Section 76.61(a)(1) of the rules, but instead references two September 26, 2008 letters electing must carry status, pursuant to Section 76.64(f)(1) and (2) of the rules.¹⁶ Charter maintains that nowhere in its petition does WHRE-DT suggest that these September 26th letters satisfy the written notice requirements of Section 76.61(a)(1) of the rules, but, to the contrary, refers to them explicitly as "formal election letters."¹⁷ Charter argues that the Commission has previously dismissed must carry complaints that were filed on the basis of must carry/retransmission consent election letters pursuant to Section 76.64(f) of the rules as premature.¹⁸ Charter asserts that, while it appears that WHRE-DT did make a timely must carry election, pursuant to Section 76.64(f) of the rules, it did not provide the necessary notice of failure to carry in accordance with Section 76.61(a)(1) of the rules.¹⁹ As a result, Charter maintains that it was not required to respond to the September 26th election letters, nor did its failure to respond trigger the 60-day complaint cycle.²⁰

5. In reply, WHRE-DT argues that Charter's allegation that the must carry complaint was untimely because it was not filed within 60 days after rejection of the carriage request is wholly without merit.²¹ WHRE-DT asserts that it is well established that the 60-day period for filing a must carry request does not begin to run until after the cable company has finally rejected the television station's request for carriage.²² Moreover, WHRE-DT argues, if the television licensee or its representative are in communication with the cable company, looking towards a voluntary agreement for carriage, the 60-day time does not begin to run until the cable company cuts off negotiations and issues a final rejection.²³ In this instance, WHRE-DT states that the local manager for Trinity entered into negotiations with Charter after WHRE-DT's September 26th letter and, after signal strength tests confirmed on September 29, 2009, that WHRE-DT provided an adequate signal, was notified by Charter on October 6, 2009, that Charter would issue a formal response and either begin carriage or deny carriage accordingly.²⁴ WHRE-DT maintains that its complaint was filed within the 60-day time period after Charter cut off negotiations and was, therefore, timely filed.²⁵

6. We will grant WHRE-DT's complaint. Initially, with regard to procedural issues, we note that the Commission's must carry requirements set forth a two-part notification process with which stations are required to comply: the retransmission consent/must carry election notification required by

¹⁵*Id.*, citing 47 C.F.R. §§ 76.61(a)(2) and 76.61(a)(3) and (5).

¹⁶*Id.*

¹⁷*Id.* at 2-3, citing Complaint at 2.

¹⁸*Id.* at 3, citing *KM Television, L.L.C.*, 19 FCC Rcd 8622, 8625 (2004); *Rancho Palos Verdes Broadcasters, Inc.*, 18 FCC Rcd 9968 (2003).

¹⁹*Id.* at 4.

²⁰*Id.*

²¹Reply at 1.

²²*Id.* at 1-2.

²³*Id.* at 2, citing *Greater Worcester Cablevision, Inc., et al.*, 10 FCC Rcd 12569 (1995).

²⁴*Id.*, citing Exhibit A.

²⁵*Id.* at 2.

Section 76.64(f) of the Commission's rules and the demand for carriage by qualified stations set out in Section 76.61(a) of the Commission's rules.²⁶ From the evidence before us, we find that WHRE-DT's September 26, 2008 letters to Charter to be election notices, pursuant to Section 76.64(f)(4) of the Commission's rules and not an actual demand for carriage pursuant to Section 76.61(a) of the rules.²⁷ As a result, Charter's failure to continue negotiations after October 6, 2009 would not have triggered the 60-day complaint cycle required by Section 76.61(a)(5) of the Commission's rules.²⁸ However, because the parties have filed responsive pleadings in this proceeding, we see no public interest reason to dismiss WHRE-DT's petition solely for the purpose of initiating a new demand for carriage/notification cycle. As we have done in prior similar situations, we will accept WHRE-DT's petition in order to assess its must carry rights.²⁹

7. We find that the representations made by WHRE-DT demonstrate that it is a local commercial television station qualified for carriage on Charter's cable systems serving the communities referenced in WHRE-DT's September 26th election letters – Chincoteague, Franklin, Suffolk, Tangier Island, and Cape Charles, Virginia; and Gates, Waves, and Manteo, North Carolina. While WHRE-DT's petition stated that it was requesting carriage for all of Charter's communities in the Norfolk DMA, we do not grant unilateral DMA-wide carriage in must carry complaints, but only for specifically noted communities. Under the Commission's must carry rules, cable operators have the burden of showing that a commercial station that is located in the same television market as a cable operator is not entitled to carriage.³⁰ Charter has not done so. Moreover, from statements made by Charter in its April 10, 2006 response to WHRE-DT and, as set forth in Trinity's Declaration, Charter appears to concede that WHRE-DT provides a "good quality signal" to its headend.³¹ As a result, we find that grant of WHRE-DT's request to be in the public interest.

²⁶47 C.F.R. §§ 76.64(f) and 76.61(a).

²⁷*Id.*

²⁸47 C.F.R. § 76.61(a)(5).

²⁹See e.g., *Rancho Palos Verdes Broadcasters, Inc. v. Communications Services*, 18 FCC Rcd 9586 (2003); *Rancho Palos Verdes Broadcasters, Inc. v. Lone Pine Television, Inc.*, 18 FCC Rcd 7068 (2003).

³⁰See *Must Carry Order*, 8 FCC Rcd at 2990.

³¹If Charter contests that WHRE-DT provides a "good quality signal" to its headend, it can file a petition for reconsideration of this Order. 47 C.F.R. § 1.106.

III. ORDERING CLAUSES

8. Accordingly, **IT IS ORDERED** that the petition filed by Copeland Channel 21, LLC, licensee of television broadcast station WHRE-DT, Virginia Beach, Virginia, **IS GRANTED** pursuant to Section 614(d)(3) of the Communications Act of 1934, as amended, 47 U.S.C. § 534. Charter Communications, Inc. **IS ORDERED** to commence carriage of WHRE-DT on its cable systems serving the communities of Chincoteague, Franklin, Suffolk, Tangier Island, and Cape Charles, Virginia; and Gates, Waves, and Manteo, North Carolina, within sixty (60) days from the release date of this Order.

9. This action is taken pursuant to authority delegated by Section 0.283 of the Commission's rules.³²

FEDERAL COMMUNICATIONS COMMISSION

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³²47 C.F.R. § 0.283.